114-252

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.—No. 103.

CHARLES R. BISSELL,
Appellant,

against

SIMON H. FOSS, ABSALOM V. HUNTER and THE FIRST NATIONAL BANK OF DENVER,
Appellees.

ASSOCIATION

ARGUMENT

OF

JOHN F. DILLON AND
L. C. ROCKWELL,
For the Appellant.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

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AGAINST

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Argument of JOHN F. DILLON and L. C. ROCKWELL for the Appellant.

Statement of the Case.

THE FINAL DECREE appealed against (Record, p. 151) gave to Foss and Hunter, appellees, the $36,454.35, which, pursuant to the stipulations of the parties, was, at the time of the decree, in the registry of the Court. From this decree the present appeal is prosecuted by Bissell.

THE ADVERSE PARTIES to this controversy as it now stands, are BISSELL, the appellant, on the one side, and Foss and HUNTER, the appellees, on the other.

THE ONLY QUESTION IN THE CASE is who owns or was entitled to this $36,454.55, Bissell, the appellant, or Foss and Hunter, the appellees?

THE UNDISPUTED OR ADMITTED FACTS ARE THESE: April 20, 1878, one Davidson and Van Boxall having discovered a mine on the public lands near Leadville, called the Winnemuck Lode, made an arrangement with Bissell for means to develop the mine by sinking a shaft down to the mineral, for a three-fourths interest to Bissell, all at one and at the same time.

Record: Bissell's account, p. 73; Foss' account, p. 34.

Bissell allowed one Trimble (whose interest was shared with and held in the name of the said Hunter, one of the appellees, who was cashier of the Peoples' Bank at Colorado Springs) to come in with him (Bissell), and, at Trimble's request, also took in Foss, the other appellee.

Record, p. 73.

THE INTERESTS were one-fourth each, viz: Davidson and Van Boxall (the discoverers) $\frac{1}{4}$; Bissell, $\frac{1}{4}$; Hunter, $\frac{1}{4}$, and Foss, $\frac{1}{4}$.

Record, pp. 73, 34, 39.

These parties worked the mine as mining partners, sharing the profits and losses on this basis (Record, p. 73) until July, 1878, when Davidson and Van Boxall, with consent of their associates, sold their one-fourth to "*the Missourians*," so called, viz: RAWLINGS, HANDLEY and ROBERTSON. They, as the successors of the discoverers of the mine, worked the same in partnership with Bissell, Foss and Hunter until October 2, 1878, when "the Missourians" made to Foss the sale of their quarter interest, out of which this dispute arises.

Handley's Ev., Record, p. 45.
Bissell, p. 73.
Foss, p. 34.

Meanwhile, however, September 15, 1878 (Record, p. 123), these four parties had bought a joint interest of one-fourth each in another mine called the *New Discovery*, and paid for it out of their partnership moneys on deposit in the *Miners' Exchange Bank at Leadville.*

Handley, p. 71.
Bissell, pp. 73, 123.
Cavender, p. 103.

These four continued to work the mines as mining partners, and the moneys, by arrangement, were deposited with the said Miners' Exchange Bank, where there was, on October 2, 1878, the date of the purchase now in dispute, to their credit, about $16,000.

Handley, p. 47.
Foss, p. 36.

TABOR and CHAFFEE set up an adverse claim to the Winnemuck mine and levied from time to time attachments on the ore, which the parties released on forthcoming bonds, executed by them jointly with one Hallock as surety.

Record, 29, 30, 115.

"THE MISSOURIANS" wanted to sell, and Bissell and Foss, two of the partners, had interviews with each other on the 30th of September and the 1st of October, 1878, relative to buying out "the Missourians" for *the benefit of the firm.* Bissell, pursuant to his understanding with Foss, opened negotiations October 1st with the Missouri party.

Bissell, p. 74.
Foss, pp. 34, 37.
Handley, pp. 53, 129, 130.

The details of these interviews of September 30 and October 1 between Bissell and Foss are, to some little extent, matters of dispute, but for all the purposes of this case Foss admits, as we think, all that is necessary to establish the equity set up by the appellant.

The testimony of these parties as to these interviews will be referred to in detail further on.

On the 2d day of October, 1878, Foss clandestinely purchased for the sum of $15,000 of the Missourians their entire interest in the two mines, viz., the Winnemuck and the New Discovery, and in the $16,000 on deposit in the Exchange Bank. Hunter was told by Foss "*about the talk he* (*Foss*) *had with Dr. Bissell*" (Foss' Ev., p. 40, Cross-Int. 19), and yet he co-operated with Foss in making the purchase, so as to defraud Bissell, acting, as he admits, the part of a decoy, and making, at the same time, a sham sale of his $\frac{1}{4}$ interest to Foss to blind the Missourians, as Foss admits and states on oath (Record, p. 39), and as the deeds show (Record, pp. 138, 140).

When Foss had completed this purchase, instead of notifying Bissell and paying the purchase price out of the moneys in the Exchange Bank at Leadville, or calling on Bissell to contribute, Foss requests "the Missourians" "*not to let Dr. Bissell know anything of what was going on*"—"*not to tell Bissell we had sold to him*" (Handley's Ev., Record, p.

53), which Foss does not deny (Foss' Ev., p. 40); and tries to get them out of town before Bissell discovered it, a discovery which he made by accident as they were about leaving with their carpet sacks to go with Foss and Hunter to Colorado Springs where Hunter's bank was located.

Bissell's Ev., p. 75.
Foss' Ev., p. 38.

Foss finally denied Bissell's right to a one-third interest in the purchase from "the Missourians."

Bissell's Ev., p. 75.
Foss' Ev., p. 38.

MATTERS THUS REMAINED until November 16, 1878, when the *Tabor and Chaffee* party on the one side, and the *Foss, Hunter and Bissell* party on the other, UNITED AND CONSOLIDATED their interests by a joint conveyance to General BELA M. HUGHES, trustee, to hold $\frac{73}{100}$ parts for the Tabor and Chaffee party and $\frac{27}{100}$ parts for Bissell, Foss and Hunter; the mines were to be worked and the moneys deposited in the said *First National Bank of Denver* and credited in the above proportions to the respective parties.

(Text of deed in trust; Record, pp. 1, 2, 3).

It is expressly agreed that the amount so to be credited to Foss, Hunter and Bissell "should be subject to be checked as agreed upon by the respective parties and made known to the bank" (p. 3).

Down to April 2, 1879, there was in this bank to the credit of Foss, Hunter & Bissell $92,502.58.

Record, p. 3.

Of this sum Foss and Hunter claim $\frac{9}{12}$ and Bissell $\frac{4}{12}$. If Bissell is not entitled to the benefit of $\frac{1}{3}$ of the $\frac{1}{4}$ share purchased by Foss of "the Missourians" he is only entitled to $\frac{3}{12}$; if he is thus entitled, then he owns $\frac{4}{12}$ of that fund and the other parties $\frac{8}{12}$ thereof.

Bissell at one time claimed to the bank more, but that claim was abandoned long before the suit was ended.

In this condition of affairs, Foss and Hunter, on April 26, 1879, commenced their original suit in equity in the U. S. Circuit Court for Colorado, against the First National Bank as the depositary, and against Bissell as the adverse claimant to recover the $\frac{9}{12}$ of the fund.

The bill required Bissell to answer *under oath*.

Record, p. 6.

On June 9 the bank answered (Record, p. 10), and on the same day filed a Cross Bill in the nature of a Bill of Interpleader (Record, p. 154), setting forth in substance that it was a stakeholder; that it claimed an interest in the fund adverse to either party; and asking that Foss and Hunter and Bissell be compelled to interplead and settle their respective rights to the money on deposit in the Bank.

Record, pp. 154–157.

On July 5, 1879, Bissell answered, under oath, to the merits the original bill of Foss and Hunter, setting up his claim to $\frac{4}{12}$ of the fund.

Record, pp. 13–20.

On the same July 5 Bissell filed his answer to the cross bill of the bank, setting up his claim to the $\frac{4}{12}$ of the fund.

Record, pp. 160–166.

On July 7, 1879, Foss and Hunter filed a general *replication* to Bissell's answer (Record, p. 20); and on the same day, Foss & Hunter filed a formal, meagre answer to the cross-bill of the bank.

Record, pp. 166, 167.

But Foss and Hunter filed no pleading denying any of the matters set up in Bissell's answer to the cross-bill of the bank.

On July 6, 1880, the parties stipulated "that the decision of the Court shall determine the rights of the parties not only to the amount claimed in the original *petition* (*sic.*), but to the whole amount in the registry of the Court."

Record, p. 150.

On the same day the cause was submitted on final hearing, and on the same day, the Court ENTERED A DECREE "that Foss and Hunter were entitled to the $36,454.35 in controversy in the registry of the Court.

Record, p. 151.

The cause was heard and the final decree rendered by Mr. District Judge HALLETT, whose OPINION is not in the record, but will be found reported in 2 McCrary, Cir. C. Rep., 73.

The learned Judge did not decide against the appellant upon the main ground upon which his counsel rested and now rests his right to relief, as a comparison of his opinion with this argument will show.

Assignment of Errors.

1. The Court erred in not granting a decree for the appellant, on the ground that there was a *contract*

between the appellant and the appellees, that the purchase from the Missourians should be for their common benefit.

2. In not decreeing for the appellant on the ground that there was a *constructive trust* in his favor, as against Foss and Hunter, for the appellant's proportionate share of the property purchased by Foss from the Missourians.

3. The pleadings and proofs show that the appellant was entitled to the money in Court, and it erred in not so decreeing.

ARGUMENT.

I.

There was a CONTRACT between Bissell and Foss that the interest of "the Missourians" should be purchased, if it could be, for $15,000 for the equal benefit of the copartners and co-owners.

II.

At all events there was a mutual agreement or promise, between Bissell and Foss, that, if either made the purchase, IT SHOULD BE FOR THE BENEFIT OF ALL; and this agreement or promise, although it might not amount to a contract which could be specifically enforced if it

had been made with a stranger who purchased and paid for real estate with his own money, and then set up the Statute of Frauds as a defense, creates between parties who sustained towards each other the confidential and trust relations which existed between these parties, a CONSTRUCTIVE TRUST, which is not within the Statute of Frauds (even if it were pleaded), and which will be enforced in equity.

These propositions will be discussed together.

WHAT WERE THE RELATIONS of the parties on the 2d of October, 1876, when Foss made the purchase of the quarter interest from "the Missourians?"

In 1878 Davidson and Van Boxall had discovered the lode and located it. It was called the Winnemuck mine or lode. It was on the public land. By law it is necessarily very limited in area.

The land was probably quite worthless aside from the lode or minerals it contained. The discoverers were unable to develop it, and on the 20th of April, 1878, Bissell agreed with them to furnish the means "to develop the mine and sink the shaft to minerals for a three-fourths interest" (Record, p. 73), Foss and Hunter (the latter holding Trimble's interest) went into this arrangement as Bissell's associates.

Record, p. 73.

The discoverers retained an undivided quarter interest, and Bissell, Foss and Hunter each had an undivided fourth. They worked the mine as partners until July of the same year, when the discoverers sold out to "the Missouri party" (Rawlins, Handley and Robertson), with the assent of Bissell, Foss and Hunter. They continued to work the mines as partners, and on the 25th of September of the same year, the firm bought an interest in the New Discovery mine and paid for it out of the product of the Winnemuck.

They still continued to work the mine as partners. The Tabor-Chaffee party claimed an adverse title and attached from time to time the product as it was mined, which was released on forthcoming bonds, sold and the proceeds deposited in the Miner's Exchange Bank. On or about October 1st, there was about $16,000 thus on deposit. "The Missourians" then wanted to sell. Bissell and Foss wanted to buy. Hunter lived at Colorado Springs, many miles distant. Trimble (the secret partner of Hunter), "was not in Leadville at the time and knew nothing about the matter."

Trimble Ev., Record, p. 59.

What took place between Foss and Bissell in respect to the proposed purchase, has to be learned from their testimony. We will reproduce here all that seems to us materially to bear on this subject.

The Evidence.

Bissell testifies as follows (Record, pp. 74, 75):

"Int. 10. State what you know, if anything, about Rawlings, Handley and Robertson selling their quarter interest in the Winnemuck and New Discovery to Foss.

A. Along about the 30th day of September Mr. Foss came to my room and stated that the Missourians, as we termed them, were wanting to sell their quarter interest in the property, and had offered it for $30,000, and he said that he thought *we had better go in and buy it.* I said to him that it was all well enough to buy it, if they wanted to sell, but that I was confident that I could get it at better figures. I said, "I am almost certain, Mr. Foss, that I can buy it for less; let me manage it and I think I can buy it for $15,000," and went on to say what I would say to them concerning all the trouble and suits in the case. He said, "Very well, if you can get it for that so much the better." *It was an agreement and understanding between us, that if we could get it for $15,000 we were to take it.* The next day I saw Mr. Rawlings—he was recognized by us all as the leading spirit of the three parties—and had quite a talk with him in just the same manner I had stated to Mr. Foss. And we talked with him, and I found Mr. Rawlings very much disposed to take it; he told me he thought he would take it, and that the others would take it. *I saw Mr. Foss on election day and told him what I had said, and that I felt very confident that they would take our price.* Election day was on the first of October. That same day I had another talk with Mr. Rawlings; I never, at any time, had any talk with any of the rest of them about it. This conversation that Mr. Handley speaks of as having had with me (see Record, p. 46) was days and weeks prior to this; it was at least weeks prior to this time. I refer to the conversation where Mr. Handley speaks of offering to sell for $30,000 to me. I never did speak to any one but Mr. Rawlings, after we really started in to purchase the property.

Int. 11. At the time you and Foss had the conversation which you speak of, about the purchase, in your room, where did you calculate the money was coming from to pay for this property?

A. *We sat down there and made figures to see if we could pay for it out of the money belonging to the company in bank;* and the result of our figuring was, that we couldn't do it to the full extent; that we could pay a portion of it from that money, and the balance outside, each of us raise our share.

(No cross-examination on this above.)

Int. 12. State whether or not there was any agreement or understanding between you, Foss and Hunter and your bondsmen in those attachment suits, that the money in bank should not be used?

until July of the same year, when the discoverers sold out to "the Missouri party" (Rawlins, Handley and Robertson), with the assent of Bissell, Foss and Hunter. They continued to work the mines as partners, and on the 25th of September of the same year, the firm bought an interest in the New Discovery mine and paid for it out of the product of the Winnemuck.

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(No cross-examination on this above.)

Int. 12. State whether or not there was any agreement or understanding between you, Foss and Hunter and your bondsmen in those attachment suits, that the money in bank should not be used?

A. There was no arrangement of that sort made to my knowledge; I never have heard or known of any such arrangement until I heard of it here. Mr. Halleck, who went on that bond, was a friend of us all, and had confidence in us all that we would protect him from loss. I never have known of any such arrangement.

Int. 13. Did you use that money for any purpose?

A. We used a portion of it for the purchase of the New Discovery.

Int. 14. You used all there was?

A. Yes; and Mr. Halleck loaned us some more to complete the amount needed. He was either to consider it as a loan or take an interest in the property, as he preferred. He afterwards considered it as a loan, and we paid him back his money.

Int 15. State whether or not you, Foss and Hunter, offered or agreed to indemnify Mr. Halleck and your other bondsmen, in case they wanted it, upon other property?

A. There was no regular proposition to Mr. Halleck for anything of that kind. We did say to Mr. Halleck, after purchasing the New Discovery mine, that if he wanted it, we would give him a lien on the mine as security.

Int. 16. After you had these conversations with Foss and Rawlings regarding the purchase of their interest, *of their interest* in this property, when was the first time after these conversations that you learned that the purchase had been made by Foss, and under what circumstances?

A. On the evening of the second day of October I was sitting in Tribe and Jeffrey's store; it was then the stage office of the Colorado Springs line. In came the three Missourians, with carpet-sacks and baggage, and asked the permission of leaving their traps there until morning. I went forward and said, "What does this mean?" They said that they had sold out. I asked them who they had sold to, and they said to Mr. Foss. Then I asked them what price they got, and they said $15,000. I was at once feeling good and turned about in less than thirty seconds and looked up Mr. Foss. I went to his room where he was living and met him at the foot of the stairs. I said to Mr. Foss, "You have bought out those Missourians?" He said, "Yes." I said, "Under the arrangement which we had agreed upon?" He said that it was "good enough;" that the Missourians were in a hurry to sell, and *that he was afraid to take the time to come down town and see me, and so he had just closed with them then.* I said, "You consider me in on my interest, don't you?" He said, "I don't know, you were not there," or something of that kind. "Well," I said, "Mr. Foss, I want you distinctly to understand that I have an interest there. My money is ready to pay my portion of it, and I am going to have my interest in the purchase."

Int. 17. What reply did he make?

A. Nothing, except in some vague way; that he didn't know nothing positive, one way or the other.

Int. 18. Did you hear Mr. Handley's testimony yesterday in which he said that he thought you made the remark, "You have played hell," when he told you that they had sold to Foss?

A. I heard it.

Int. 19. State what the fact was?

A. I state most positively and distinctly that there was nothing of the kind said.

Int. 20. State whether or not there was any proposition or talk between you and Foss that you could purchase their interest at a less sum than $15,000 *dollars?*

A. There never was any talk between Foss and myself that there was a chance of getting it for less than $15,000. His talk was $30,000, and he did not think he could get it for less. There was no less sum than $15,000 spoken of by either of us.

Int. 21. If there was $16,000 in the Exchange Bank at the time of this purchase belonging to the Winnemuck Company, a quarter of which money belonged to Robertson, Rawlings and Handley, and the interest in that money passed under this purchase, was there not enough money in bank to more than pay for the interest purchased by Foss?

A. Yes, sir; if I understand the question there was a thousand dollars more than enough to pay for it—taking Mr. Trimble and others statements as to the $16,000.

Int. 22. At that time did you know the exact sum in bank to the credit of the Winnemuck mine?

A. I didn't know exactly; probably not within two or three or four thousand dollars.

Int. 23. At that time, were you able and willing to raise your proportion of this $15,000 to pay for the purchase; and, if yea, state what your proportion would have been with Mr. Foss?

A. My proportion was $5,000, which at all times I was ready to pay, and I so told Mr. Foss.

Int. 24. Who were to have the other two-thirds interest in this quarter interest.

A. They were to go between us three, Mr. Trimble and Hunter, Foss and myself. Mr. Trimble and Hunter's were interests together; they owned jointly that quarter interest—so I was informed by Mr. Trimble and Mr. Hunter.

Foss (as a witness for himself testifies, Record, pp. 34, 37):

" Int. 13. After Handley, Robertson, and Rawlings bought the quarter interest of Davidson and Van Boxall, did the then owners of the Winnemuck operate together?

A. They operated until the last of September, 1878.

Int. 14. In the last of September, 1878, can you state how, if at all, the interests of these several parties who were owners in the mine were changed?

A. Well, in the first place, these Missourians (as we always called them), Handley, Robertson, and Rawlings, wanted to dispose of their interest. They wanted to draw out some money, and I told them that as long as Tabor and the Little Pittsburg Company were suing us and attaching our ore, etc., it was impossible to let them have any money, as we had given our word to Halleck and the others who went on our attachment bonds that we would retain all the money, or deposit it in bank. *In the mean time Mr. Handley kept wanting to sell, and I went to Dr. Bissell and talked it over with him about buying them out. We talked about $20,000; they had asked $30,000; the Doctor and I talked it over, about twenty thousand dollars, and he said we can do better than that.* So it ran along for a week, perhaps, or more; perhaps two weeks. I spoke to Handley, and asked him if anything had been done; if anything had been said to him; he said, no. I was over to the Theatre Comique one evening, and said, we want to do something right away about buying that interest. I understood that a man by the name of Dexter had been in the mine for the purpose of looking at it and buying an interest for Tabor, and so getting possession. While I was sitting there Hunter came in and overheard some of the conversation, and I concluded that we had got to buy it at any price. I told Hunter to go ahead. Hunter went ahead with it and we brought it, or I bought it.

Int. 15. Before going further into that will you explain what litigation had taken place between the owners of the Little Pittsburg and yourselves before that time?

A. They had been attaching our ore.

Int. 16. Give an explanation of those lawsuits.

A. All the ore we hauled from the mine was attached by Tabor and Rische, and we had to give a forthcoming bond to get the ore; we gave good security every time, and secured them by leaving the money in bank; that was the reason why we could not declare a dividend.

Record, pp. 34, 35.

Int. 41. Will you state, Mr. Foss, what conversation, if any, you had with Dr. Bissell, prior to your concluding the trade with Handley, in reference to his taking and interest with you in that purchase? (Record p 37.)

A. I met Dr. Bissell over Tribe and Jeffrey's store, in Leadville, and we talked the purchase over. I told him that the boys wanted to get out bad, and I thought they would sell pretty reasonable; but that as I was working around there managing the mine, *he could do better than I could.* I said he had mentioned to us one night on the street $30,000 as a price, but that we wouldn't agree to for a moment. We wondered how we could do about the money for the purchase. If we could use the company money, we thought we must use a little more than our joint interest. *Bissell was to see the boys in regard to it.* The matter went on, and a little while before the trade, perhaps a week before, I saw Handley and asked him if Bissell had said anything to him. He said, no; and a day or two after this conversation with Handley I met Hunter in the Comique Theatre. The foreman of the mine had been to me and told what was going on. We talked and thought the thing over. When I saw these boys again I asked Mr. Rawlings if anybody had been up to the mine. He said, no. I couldn't find out anything. I was nervous, knowing Tabor was working to get the upper hand of us; and finally the end of it all was that I bought the interest, as I have testified before.

Int. 42. State what was said about the price.

A. We talked the amount; $20,000.00 was spoken of. He [Bissell] thought that was too high and more than we should give. I thought so too, but $30,000.00 was the price fixed by them. *That I wouldn't think of for a moment.* We [*i. e.* he and Bissell] figured it over, but I don't remember the exact figures, and *we concluded that at $15,000.00* WE *could pay for it,* in case we could draw out the money in the Exchange Bank. Dr. Bissell thought it could be bought for less than $10,000.00. There was no proposition made for any definite price, *but if we could buy the property we were to buy it together.* HE *was to see what was the best he could do with it.*

Int. 43. State whether there was, up to the time you concluded the trade with Handley, any agreement with Dr. Bissell that you and he should buy that property for $15,000?

A. No, sir.

Int. 44. State what your own financial condition was at that time, Mr. Foss. (Record, p. 37).

A. All the resources I had was a small grocery store not paying very largely, and I was just living in the hope of beating Tabor.

Int. 45. State whether you had any money of your own at that time.

A. The money that I drew from the bank, $300.00, to pay Handley and the others, brought my account down very low.

Int. 46. I'll get you to state whether, at the time the agreement was made to purchase for $15,000.00, you had that amount of money on hand.

A. No, sir.

Int. 47. After you had your talk with Dr. Bissell you made your arrangement with the cashier of the People's Bank to furnish the money?

A. Yes, sir.

Int. 48. By that agreement you were to have one-twelfth and he was to have two-twelfths for furnishing the money?

A. In consideration of their furnishing the money they were to have two-twelfths.

Int. 49. I will get you to state whether, in that arrangement with Mr. Hunter, Dr. Bissell was at all interested.

A. No, sir.

Int. 50. After you had concluded the trade with Handley, had you then any conversation with Dr. Bissel, about it? If so, state what that conversation was.

A. Yes, sir; Dr. Bissell met me at the store of Tribe and Jeffreys, and asked me what I had done. I said, "Not much of anything." He then asked me, "Did you buy out the Missourians?" I said, "Yes." He asked what I gave, and I told him $15,000. He "poohed" at it, and acted as if he scarcely believed it, but didn't exactly contradict me; and then I walked off up street with him. There was some other remark made there then; I don't exactly remember it; I think he said "I want to be posted." I think he asked me then who went in with me; I told him Hunter; I believe he said then that "he wanted —in;" I told him "it was more than we talked of;" I think those were just the words I used, "it is more than we talked of." He said, "No," and I walked off, or he went away.

Int. 51. What was his manner, and what else did he say, if anything?

A. I told him "we couldn't use the company money as we talked of;" and he said, "I can raise as much money as anybody."

Int. 52. Was any portion of the money in the Exchange Bank, belonging to the Winnemuck mine used in paying Handley, Robertson, and Rawlings for their interest?

A. Not a cent. (Record, p. 38).

Foss on cross-examination said (Record, 41):

27 x-Int. At the time you had the talk with Dr. Bissell, at the room, did not the doctor talk $15,000.00 as the price at which the interest could be bought, and explain what kind of talk he would give them?

A. He said it could be bought for less than $10,000.00, for seven or eight thousand. Those are are the only figures I remember being used.

28 x-Int. The bonds in the attachment cases were all signed by you, Bissell, Trimble, Halleck and others?

A. Yes.

room, was it not understood between you, that Bissell

29 x-Int. At the time you and Bissell had the talk

in his room, was it not understood between you that Dr. Bissell was to talk with them, and get it down to $15,000.00, and that he was to refer to the liability under the attachment suits to them on those bonds?

A. Yes; I remember the whole of that convesation, except about the $15,000.00; I don't think that was the sum which the doctor said the interest could be bought for; the argument was used that there was no money which could be drawn at present.

30 x-Int. Did this deed which they made you convey or carry their interest in this money deposited in the bank?

A. It did; as well as the ground; I took Mr. Handley into the bank, and Mr. Donelson showed him the books and just what amount was deposited there; and that as soon as the suits were settled, some of it would belong to them, but until it was settled nothing could be turned over to them.

31 x-Int. Then this deed covered the money in the bank as well as in the mine?

A. Yes, sir.

32 x-Int. You say you didn't understand that Dr. Bissell was in that purchase?

A. No, sir.

33 x-Int. You knew that Tabor and Rische, on the one side, as plaintiffs, and Bissell, Foss, and Hunter, and Handley, Bobertson, and Rawlings, as defendants, had considerable trouble regarding the right to the ore taken out of the mine by the last-named gentlemen, did you not?

A. Yes; we had lots of suits about it.

34 x-Int. There was a suit commenced for an injunction by Rische and Tabor againt your parties in the month of September, 1878, was there not?

A. I presume so; they were commenced all along there. (Record, 42).

Bissell's answer was on oath, and the **burden of proof** is on the appellants.

Your HONORS may be curious to know how the foregoing testimony impressed the learned Judge who heard the cause below.

Judge HALLETT in his opinion thus refers to it:

"The subject of the purchase [from the Missourians] became a matter of consultation and conference between Bissell and Foss, and they agreed as to the propriety of making it if the property could be had at a reasonable price. But it does not appear that there was any definite understanding as to what sum should be paid for it [a mistake I think in point of fact and not material in point of law], or where the money for that purpose should be obtained." * * "As a result of several interviews between Bissell and Foss on the subject of the purchase it may be said that they were united in a purpose to get the Handley (Missourians') interest if it could be obtained at a cost of $30,000 or less [it was $15,000 or less], but nothing was done towards the raising the money. [How is that material?] * *. There was, indeed, an agreement between Foss and Bissell to purchase the Handley interest if that may be called an agreement which lacks the essential features of a price for the property and money to pay for it." [The fundamental misconception here and throughout is that this was a bill to enforce a special performance of a contract with a stranger]. "If we regard Foss and Bissell agreeing to an agency in respect to the purchase of the property the case is not different. For if one who is clearly an agent to purchase property repudiate the agency and act for himself, using his own funds, he cannot be declared a trustee for his principal. *Burden v. Shenden*, 36 Iowa, 125." [The same fundamental misconception of the nature of the suit, overlooking the trust relations of the parties, and the fact that no statute of frauds was either pleadable or pleaded]. * * "The property was sold to Foss, who in fact received it, and Bissell comes to complain that he was not admitted to the purchase, as by his agreement with Foss he should have been. However, he may have been misled by the conduct of Foss; he was not in fact a purchaser, and Foss did not receive the property to his use in any way, and, therefore, he acquired no interest in it. If in making the purchase Foss violated his promise to Bissell in that there was a moral wrong, and possibly there may be some remedy for the breach. It cannot be said by such a promise only Bissell, who furnished no part of the purchase money, acquired an interest in the mines."

It is evident that the learned Judge found as a matter of fact that Bissell and Foss had *reciprocally promised each other to act together in the purchase for the benefit of the firm, on which promise Bissell relied*, but because Foss in buying it used no money of Bissell's, the latter is remediless in equity for what is justly characterised by the learned Judge a " moral wrong." If *equity* cannot furnish a remedy, where will one be found ?

It will not be difficult to show, when the relations of the parties and the nature of the business in which they were engaged are considered, that if there was such a promise, although not in writing, as the learned Judge concedes to have been made, and Bissell acted and relied upon it, and started the negotiations, which were consummated by Foss, the latter will be regarded and held by a Court of equity as the *trustee* for Bissell for his share of the purchase, on the sole condition of his contributing his share of the purchase price.

THIS IS NOT the case of an ordinary tenancy in common in land. The land was incidental or accessory to the business of mining. In that business the parties Bissell, Foss, and Hunter were copartners. The learned Judge below seemed to think the main thing was the ownership of the lands to which the partnership was incidental. We would reverse it. There are many cases in the books where when mining lands have been acquired for the purpose of carrying on the business of mining thereon, they have been considered as *accessory* to the business and treated as partnership property. The Court will find some of the cases referred to and stated by Mr. Justice LINDLEY. 2 Partnership, 653, 654.

It is not necessary here to claim that the real estate (if the title had ever been acquired from the United States, of which there is no evidence) was strictly partnership property. The proof shows that Bissell, Foss, and Hunter (Record, pp. 134, 139) went into this venture *at one and the same time on a scheme not to acquire lands as their main object*, but under a scheme which required them to develop the mine and work the lode as partners. The carrying on of the business of mining was their principal purpose. In this they were copartners.*

Bissell's Evidence, Record, p. 72.
Foss' Evidence, Record, pp. 134, 139.
Hunter's Evidence, Record, p. 63.
Complaint, Record, pp. 1, 2.
Answers, Record, pp. 14, 19, 161, 164.

*** This arrangement Constituted them MINING PARTNERS.**

Merley vs. Ennis, 2 Colorado, 300. At page 304 the Court says: "If two or more go into the public domain together to search and "explore for mines, with the agreement to occupy and develop "such discoveries as may be made for the joint benefit, and such "discovery, development and joint occupation follow, it is clear "that while each explorer becomes invested with his due share and "estate in the premises no provision of the Statute of Frauds is violated. The 8th section, which was relied upon in argument, applies strictly to contracts of sale. But, in the case supposed, "neither of the parties has, at the date of the association, any interest or estate which can be the subject of sale, and the contract of "association does not contemplate that either shall part with any.

It was to Foss, Hunter and Bissell a matter of very serious concern, as respects the firm business, whether their associates, "the Missourians," should sell to them or to their enemies, the Tabor-Chaffee party. Also a matter of grave moment whether they should sell to strangers, and thus dissolve the partnership or introduce new members or new co-owners. Bissell, Foss and Hunter had here a common interest to protect. We shall go wrong if we apply to this case the doctrine of the *jus disponendi* of each co-owner which is, or may be, applicable to co-ownership in ordinary lands on which no partnership business is carried on.

Nor are we dealing with a case where one co-owner and co-partner purchased the share of another for his own protection to secure a debt, or where he made such purchase without having had any understanding with his associate or misleading him in respect to it. But on this record we are called upon to deal with a case where two co-owners and co-partners consulting

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" Nor does the interest or estate which is afterward acquired, vest " or inure by virtue of the agreement, but by the occupation and " appropriation alone. The terms of the association may, it is true, " be referred to, to ascertain the respective rights and interests of " the occupants when controversy arises as to these, but this does " not at all impair the force of the last proposition. Each associate " is the agent of all the others, and every act done by either " about the joint adventure is the act of all. In such case, as in " the case of partnership transactions, the effect of the contract of " association is simply to fix the terms of the agency and to de er- " mine how far each may be said to act for himself, and how far " for his co-adventurers. Such contract of association is merely " the creation of an agency in each of those contracting, and is no " more a violation of law than a contract of partnership or associa- " tion in any lawful calling."

Charles vs. Eshelman *et al.* 5 Colo., 107, pp. 111 and 112, where it is said: " A mining partnership is held to exist where the several " owners of a mine co-operate in the working of the mine;" and together for the mutual advantage of the partnership business agree or promise (and a promise is an agreement) that they will act in concert in making the purchase for their common benefit, where both undertake to act, and do act conformably to such agreement or promise, and where, when one clandestinely makes the purchase, he seeks to exclude his co-owner and co-partner from a participation in it.

THE CO-OWNERSHIP IN THE LAND AND THE CO-PARTNERSHIP IN THE BUSINESS CARRIED ON UPON IT, IN CONNECTION WITH FOSS' PROMISE TO BISSELL, CREATED BETWEEN THESE PARTIES RELATIONS OF TRUST AND CON-

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this relation is governed by many of the rules relating to ordinary partnerships.

Duryea vs. Burt, 28 Cala., 569.

See also Skillman vs. Lackman, 23 Cala., 203, where it is said: "Whatever may be the rights and liabilities of tenants in common "of a mine not being worked, it is clear that where the several "owners unite and co-operate in working the mine, then a new "relation exists between them, and to a certain extent they are "governed by the rules relating to partnerships." They form what is termed a mining partnership. This language is approved in 28 Cal., *supra*.

COLLYER in his treatise on the Law relating to Mines, at page 88, says: "When companies of adventurers have been formed for the "purpose of mining, and obtain leases, either of the lands or minerals, or license to work in pursuance of that object, courts of "equity have long since recognized such associations as a species "of trading partnerships."

We beg to refer the Court to Mr. Justice LINDLEY's Treatise on Partnership, Chap. to show how utterly incapable one partner is to obtain any advantage at the expense of his copartners directly or indirectly.

FIDENCE* which entirely distinguish the case from that of a mere agency where a stranger, employed by parol to make a purchase of land for another, repudiates his agency, pays for the land with his own money, and then sets up the Statute of Frauds against his principal.

***Confidential and fiduciary relations of co-tenants.**

"TENANTS IN COMMON *are placed in a confidential relation to each other* as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them or the act of a third person. Being then interested with and for each other in the property, each one is prohibited from acquiring rights in it antagonistic to the others. (I White & Tudor, 53). Being associated as tenants in common by descent, an implied obligation exists to sustain the common interest. *This reciprocal relation will be vindicated and enforced in a court of equity as a trust.* These relations of trust and confidence bind all to put forth their best exertions and to embrace every opportunity to protect and secure the common interest and forbidding the assumption of a hostile attitude by the other; and *therefore the purchase by one of an outstanding title or encumbrance upon the joint estate in his own name will inure to the equal benefit of all; but they will be compelled to contribute their respective ratios of the consideration actually given.*"

Tisdale vs. Tisdale, 2 Sneed, (Tenn.) 597.

The Court say that "it may be different where they claim title by distinct purchases even of the same original title; but that is not the case before us."

The whole subject is ably discussed by CARUTHERS, J.

Cases are numerous and the doctrine is undisputed that if one of several tenants in common purchase an outstanding title, it will inure to the benefit of all.

Lloyd vs. Lynch, 24 Pa. St. 419,424 and cases.

Jones vs. Stanton, 11. Missouri, 433; Weaver vs. Wiebel, 25 Pa. St. 270; Picot vs. Page, 26 Missouri, 398,421.

The ground of the rule is forcibly stated by Chancellor KENT, in Van Horne vs. Fonda, 5 Johns Ch., 406.

Therefore one tenant in common cannot acquire a tax title as against his co-tenant.

Downer vs. Smith, 38 Vt. 464; Halsey vs. Blood, 29 Pa. St. 319.

LET IT BE ALSO BORNE IN MIND that not only was there trust and confidence arising out of the copartnership relation and the relation of co-tenancy, but there was *trust, in fact, actually reposed by Bissell and Foss in each other in respect of this purchase.* Suppose Bissell has made the purchase and repudiated his arrangement with Foss, would the Court have hesitated, upon the proofs as they now stand, to decree Bissell a trustee at the instance of Foss and Hunter for their

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Foss, Hunter and Bissell obtained their title *at one and the same time upon the same consideration*, viz.: their joint undertaking to sink the Winnemuck lode to mineral, for which they received a conveyance of an undivided three-fourths interest from the original discoverers of said lode.

FREEMAN on Co-tenancy and Partition, Sec. 151, says: "*The relation of co-tenants and tenants in common are those of mutual trust.* The case of tenants in common coming into the possession of real estate as co-heirs or co-devisees has always been spoken of as creating special obligations between the joint owners: in fact as forbidding either to do any act which could be unlawful or improper if done by a trustee charged with the care and preservation of a trust estate."

FREEMAN further lays down the doctrine: "Where two or more persons come to an estate by devise or descent from a common source of title, the relations between them are presumed to be relations of trust and confidence." * * * * "Where co-tenants acquire their interest by a joint conveyance, under which they both went into possession, there can be no doubt that the relation necessarily produced is as much one of *trust and confidence* as though it originated by devise or descent." * * * * "*If two or more* AGREE *to become tenants in common of a tract of land, and one of their number is deputed to make the necessary negotiations for its purchase, at the most reasonable price for which it can be obtained, he occupies such a relation towards the others as binds him to guard their interests, and to make no profit for himself in the transaction.*"

The rule will apply with much greater force when the parties already sustain the relation of tenants in common, and are under moral and legal obligations to be frank and fair in dealing with each other and are held to the highest degree of honor and fair dealing towards each other with reference to their common property.

To the same point is

King vs. Wise, 43 Cala., 628.

In Lee & Graham vs. Fox *et al*, 6 Dana (Ky), 171, at p. 176, ROBERTSON, C. J., says: "It is a well-established principle of equity that a trustee cannot by his own act alone, acquire an proportion? The question is *not* what one partner or co-owner may do where he has had no agreement with his co-partner or co-owner, but what he may do where he has such an agreement; not whether Foss could have held the whole purchase if he had had no conversation with Bissell, but whether he can hold all after his arrangement with Bissell.

Under the celebrated classification of FRAUD by Lord Hardwicke, in Chesterfield vs. Janssen (1 Atkins, 301; 2 Ves., 125; 1 Lead. Cases in Eq., 428),

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interest hostile to that of his *cestui que trust* or inconsistent with the full and proper fulfilment of all the fiduciary obligations. It is equally well settled upon analogous principles of policy and right that a purchase by a joint tenant or a copartner of an encumbrance on joint estate, shall at the election of his co-tenants within a reasonable time be held to inure to the equal benefit of all, upon the condition only that they will contribute their respective ratios of the consideration actually paid for the encumbrance."

So if the land of an intestate is sold and the widow redeemed it with her own money, a trust will be implied in favor of the heirs, and on refunding the redemption money or their portion of it they become entitled to the estate subject to the widow's right of dower.

Clark vs. Hartwell, 3 Head, 202.

In Gibson vs. Winslow, 46 Pa. St., 380 (1863), land was owned by three persons as tenants in common. On a joint judgment against them, one of the co-tenants purchased the same at sheriff's sale; and it was held that he could not set up his purchase adversly to the others, and that at most he could only hold the former interests of his co-tenants as a trustee.

Mr. Justice Strong, afterwards of this Court, delivering the opinion, says (p. 384):

"At the time of the sheriff's sale, Andrews was a *joint owner with Warner and Gillis of the land. This is a controlling fact in the cause. It settles that Andrews could not buy at sheriff's sale for his own exclusive use.* He must have held the land in trust for his own co-tenants to the extent of the shares which they held before the sale, even had the sheriff's deed been regularly delivered to him. Were the contest now between Andrews and Warner, it could not be pretended that the sale operated to transfer to the former the interest of the latter, this case, aside from the agreement and promise, falls within the third class: *Fraud presumed from the circumstances and condition of the parties contracting.*

In this class of frauds "the general rule is that relief will be afforded in equity in all transactions in

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even if all consideration of fraud and of the non-delivery of the deed be rejected."

In Britton vs. Hardy, 20 Ark., 381, it was held that one co-tenant might fairly purchase at an execution sale his co-tenant's title; but that if in such a case he induced his co-tenant to interpose no defense to the suit in which the judgment was rendered and to take no steps to delay the sale of the land and to permit it to be purchased at a nominal sum upon a *parol agreement* that his interest in the land should remain unimpaired, and *verbally agreed that purchase should be held to be for the joint benefit of the two*, such an agreement would create a trust, which is excepted out of the Statute of Frauds, if the purchaser refused to keep the parol contract.

"AN AGENT or trustee undertaking a special business for another cannot, on the subject of the trust, act for his own benefit to the injury of his principal."

Dodd vs. Wakeman, 26 N. J. Eq. 484,487; Parkist vs. Alexander, 1. Johns. Ch., 396; Condit vs. Blackwell, 7 C. E. Green, 486; Story's Equity, Sec. 315.

THE CONVERSATION AND UNDERSTANDING as testified to by Bissell and admitted by Foss, bring this case within the doctrine laid down in 43 Cala. *supra*, in Section 151 of Freeman on Co-tenancy and Partition, and the other authorities *supra*, and the Court should have so decreed.

It was not necessary for "*The Missourians*" to have been parties to this understanding or agreement between Foss and Hunter, indeed it was expressly understood between them, that the Missourians should know nothing about the agreement between Foss and Bissell. It answers the requirements of the law to have that agreement or understanding exist only between Foss and Hunter. There is nothing in the record which contradicts the statement of Bissell, that he used his best endeavors to induce the Missourians to take $15,000 for their property. He says he talked with the man who had always represented them, namely, Rawlings, who stated he thought they would take that price for their property. It is a pregnant circumstance and fully corroborates Bissell, that Foss and Hunter should have stated to the Missourians they did not desire to have Bissell know anything about the purchase. Foss was conscious that Bissell, based upon their understanding, expected an interest in the property, and Foss desired to secure the title and get the Missourians out of the country before Bissell could know anything about the purchase.

which in the language of Lord KINGSDOWNE (Smith vs. Kay, 7 House of Lords Cases, 750), in which influence has been acquired and abused, IN WHICH CONFIDENCE HAS BEEN REPOSED AND BETRAYED."

The subject is well presented in BISPHAM'S EQUITY (section 232, p. 292, second ed.), and illustrated by the case of Taté vs. Williamson in the House of Lords.

THE DOCTRINE OF EQUITY on this subject is stated with admirable precision by POMEROY (1 Pom. Eq., Sec. 155):

" CONSTRUCTIVE TRUSTS are raised by equity for the purpose of working out right and justice where there was *no intention* of the party to create such a relation, *and often directly contrary to the intention of the one holding the legal title.* All instances of constructive trust may be referred to what equity denominates fraud, either actual or constructive, including acts of omission in violation of fiduciary obligations. If a party obtains the legal title to property, not only by fraud, *or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner*, so that he cannot equitably retain the property, which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a *constructive trust* upon the property in favor of the one who is in good conscience entitled to it, and who is in equity considered the beneficial owner."

In addition to the reciprocal promise and understanding between Bissell and Foss, it is fully shown that Bissell was betrayed by Foss, and by reason of the latter's promise to purchase, Bissell was prevented from acquiring an interest which he otherwise would have done for the company (Record, p. 99), in which event he would own one-twelfth. Such perfidious conduct on Foss' part gives Bissell the right to treat him as his trustee.

Mr. Justice STORY (Equity Jurisprudence, section 258) says:

" BY CONSTRUCTIVE FRAUDS are meant such acts or
" contracts as, although not originating in any actual
" evil design or contrivance to perpetrate a positive
" fraud or injury upon other persons, are yet, by their
" tendency to deceive or mislead other persons, or to
" violate *private* or public confidence * * *
" deemed equally reprehensible with positive fraud,
" and, therefore, are prohibited by law as within the
" same reason and mischief, as acts and contracts done
" *malo animo.*"

The same learned author (section 259), speaking of constructive frauds, says:

" Others, again, rather grow out of some special
" *confidential or fiduciary relation* between all the par-
" ties, or between some of them, which is watched
" with especial jealousy and solicitude, because it
" affords the power and the means of taking undue
" advantage, or of exercising undue influence over
" others. * * * But they are chiefly prohibited
" because they operate substantially as a fraud upon
" the private rights, interests, duties or intentions of
" third persons, or unconscientiously compromit, or
" injuriously affect the private rights, interests or
" duties of the parties themselves."

And in section 1265 he says:

" The truth is, that courts of equity, in regard to
" fraud, whether it be constructive or actual, have
" adopted principles exceedingly broad and compre-
" hensive in the application of their remedial justice;
" and especially where there is any fraud touching
" property they will interfere and administer a whole-
" some justice, and sometimes even a stern justice in
" favor of innocent persons who are sufferers by it
" without any fault on their own side. This is often
" done by converting the offending party into a trus-
" tee."

So, in PERRY ON TRUSTS, Sec. 170:

" Although Courts of equity have not made general “definitions, stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. * * * The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee. * * * In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case and go at once to its essential morality and merit.”

Also, see note to the celebrated case of Fox vs. Macreath, 1 Leading Cases in Equity, Part I, 4th Am. Ed., pp. 260 and 261.

“These principles apply to all cases where confidence is reposed, to *agents*, attorneys, solicitors, cashiers of banks, *promoters of industrial enterprises*, and to every one who has entered into a fiduciary relation or assumed an obligation by contract or otherwise towards another, which would be a breach of trust or confidence to violate.”

The same principle is learnedly illustrated in note to Keech vs. Sandford, same Vol. Leading Cases in Equity, 48, at pp. 62–63.

“And this is *not* confined to acts of *express and formal trust.* The rule is applied as far as the principle and morality and policy upon which it is founded extends. *Wherever a confidence is permitted, a duty is assumed, and a trust is the medium by which chancery enforces mere duties in respect to property.* Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of third persons, or of law that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.”

THESE GENERAL PRINCIPLES have been frequently applied to analogous cases.

Thus, in Henricks vs. Nunn, 46 Texas, 141, 147, it is said:

> "It is evidently impossible to announce a formula
> " which is applicable to and will embrace every con-
> " ceivable case in which courts of equity will hold a
> " party to be a constructive trustee. It will be found,
> " however, upon examination, that the cases to which
> " this doctrine has been held applicable 'in the reme-
> " dial justice' of the courts of equity are generally
> " cases where there is some *breach of duty or want of*
> " *good faith and fair dealing* on the part of the per-
> " son acquiring the property * * * or where the
> " property has been acquired or the possession of it
> " taken on the assumption of a trust character, or
> " under the belief by those with whom the transaction
> " is had, or by reason of which it was acquired or
> " possessed, that it was taken or acquired in trust. It
> " is unquestionably a common and familiar application
> " of their remedial justice for courts of equity to force
> " upon the conscience of a party the duty of a trustee
> " in regard to property which has been acquired by
> " artifice or fraud, and where, either from the char-
> " acter of the property or the circumstances under
> " which it is acquired or held, it would be against
> " equity to permit such party to hold it except as a
> " trustee."
>
> White and Tudors' Leading Cases in Equity,
> Vol. II, part 1, p. 549.

So in the case of Morey vs. Herrick, 18 Pa. St., 123, where Morey and Fowler agreed to purchase land at a tax sale, Morey being the bidder and giving his note for the purchase price, endorsed by one Brockway. Morey entered upon the land and possessed it for several years and admitted he held half of it in trust for Powers. The Court says (p. 128): "It is well settled if one be induced to *confide in the promises of another that he will hold in trust, or that he will so purchase for one or both*, and is thus led to do what he would otherwise have forborn, or to forbear what he contemplated to do in the acquisition of an estate whereby the promisor becomes the holder of the legal title, an attempted denial of the confidence is such a fraud as will operate to convert the purchase into a trustee *ex maleficio*."

In support of this doctrine is cited the case of Stewart vs. Brown, 2 Sergeant & Rawle, 461.

Tilghman, C. J., says: "If defendant purchased at a sale for taxes under an agreement that the plaintiff should be equally concerned, he would be considered in equity as holding for the plaintiff and himself as tenants in common."

Brown vs. Dysinger, 1 Rawle, 408.

The Court in 18 Pa. St., 123, *supra*, commenting upon these two cases says: "In both the complainant *has trusted to the promise* of another to purchase at public sale certain lands for the benefit of the promisee, and it was held that the subsequent denial of that undertaking converted the promisor into a trustee for him who had been deceived. The ground was, that the *mala fides* in the prosecution of the undertaking inflicting a disappointment which otherwise might have been avoided by the confiding party, raised a trust commensurate with the undertaking. *It is true that in the first of these cases the plaintiff and defendant had been tenants in common of the land, which gave the former the benefit of another principle;* but the Court also put the determination on the ground of faithlessness as creative of a trust necessary to defeat the fraud. No doubt Samuel Brown was induced by David Walker to rely upon him and therefore did not take any other steps to secure the land, and Walker should not reap the benefit of such contract; nor can he, for a trust thereby arises to Brown for whom he becomes the trustee. To decide otherwise and to allow him to hold the land under such circumstances would be supporting a breach of trust and a fraud in law."

Kisler vs. Kisler, 2 Watts, 323.
Thompson's Lessee vs. White, 1 Dallas, 424.

WE SUBMIT, IN CONCLUSION, that it will give the Court true judicial satisfaction to apply these principles to the gross breach of faith and violation of promise and duty which this record displays on the part of the appellees, and by the impressive authority of its judgment to teach that even the transactions of mining partners and co-owners in a new community are not beyond the scope of the enlightened and salutary doctrines of equity on the subject of fraud and constructive trust—doctrines which are necessary to bind the moral elements of society together.

JOHN F. DILLON,
L. C. ROCKWELL,
For the Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1884.

CHARLES R. BISSELL, - *Appellant.*

vs. — No. 103.

SIMON H. FOSS, ABSALOM V. HUNTER, *et al.*, - - *Defendants.*

STATEMENT, ARGUMENT AND BRIEF OF D. P. DYER FOR APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1884.

CHARLES R. BISSELL, - *Appellant.*

vs. No. 103.

SIMON H. FOSS, ABSALOM V. HUNTER, *et al.*, - - *Defendants.*

STATEMENT, ARGUMENT AND BRIEF OF D. P. DYER FOR APPELLEES.

In January, 1878, two miners, named Davidson and Van Boxall, located a mining claim near Leadville, Colorado, and called it the Winnemuck.

In the month of March, following, they conveyed to Bissell, Foss and Hunter, each, a one-fourth interest in the property, in consideration of their agreement to furnish the necessary means to sink a shaft to mineral on the claim. The contract for sinking the shaft was made by Bissell, Foss and Hunter, and the work thereon progressed during the months of March, April and May of that year. In June following, Davidson and Van Boxall sold and conveyed their remaining one-fourth interest to Handley, Robertson and Rawlings. Shortly after this latter sale, ore was discovered in the shaft, and from that time until the 30th of September, of that year, the then owners of the property worked it together. This was one of a group of mines that afterwards became valuable and famous, to-wit: the Little Pittsburg, New Discovery, Dives and Winnemuck lodes. The Little Pittsburg was, at that time, owned, and being developed by Horace, A. W. Tabor and Gustave Reische.

Tabor and Reische claimed that the vein of ore, discovered in the shaft of the Winnemuck lode, was but a continuance of the vein, previously discovered by them, within the lines of the Little Pittsburg; that the apex of the lode or vein was within the surface lines also of the Little Pittsburg. On this ground chiefly they claimed the ore in the Winnemuck, and from time to time, as ore was taken from the shaft of the Winnemuck and removed to the smelting works, attachment proceedings were instituted by Tabor and Reische, and the ore seized by the sheriff, in pursuance of the command in the several writs. They brought suit also, in the District Court of the County, for an injunction against the owners of the Winnemuck, in which they sought to enjoin them from working the property and from removing any ore therefrom.

Tabor and Reische at that time were wealthy and had no difficulty in giving the necessary attachment bonds. Not so, however, with their opponents, who were poor and without the necessary influence to procure the requisite bonds to release the levy made by the sheriff.

They finally obtained the consent of Nelson Halleck to become their surety, on condition that the money (after paying expenses) realized from the sale of ore taken from the Winnemuck, should be placed in Bank as an indemnity to him, until the ownership of the ore could be judicially determined. The property proved very productive, and between the first of June and the first of August, the owners of the Winnemuck, to-wit: Bissell, Foss, Hunter, Handley, Robertson and Rawlings, had received an amount of money over and above the amount necessary to secure Halleck as surety on their bonds, and with this they purchased an interest in the New Discovery lode.

During the month of September, 1878, Handley, Robertson and Rawlings became anxious to dispose of their interests in the Winnemuck and New Discovery lodes, and were openly offering those interests for sale.

These facts coming to the knowledge of Bissell and Foss, they become solicitous lest these interests might fall into the hands of Tabor and Reische, and thus be the means of giving them an advantage in the suits then pending.

This led to several conferences between Bissell and Foss in reference to the matter, and they were fully agreed as to the desirableness of keeping these interests out of the hands of Tabor and Reische, and of procuring the same for themselves, *if* it could be done at fair figures and *if* they could find the necessary means with which to make the purchase. The question was debated between them as to whether any portion of the money in Bank for the indemnity of Halleck, could be made available for that purpose. The probable amount that would be demanded by the "Missourians" for their interests, was also discussed by Bissell and Foss at this conference. Foss was of the opinion that the interests would cost from fifteen to twenty thousand dollars, while Bissell insisted that they could be had for less than ten thousand dollars. It was finally understood that Bissell should "*sound*" the "Missourians" and, after magnifying the legal difficulties that beset their interests, get a proposition of sale from them. This was about all that occurred at this conference. No agreement was made as to the amount to be offered the "Missourians" for their interests.

nor was there any agreement or understanding about where the money was to come from with which to make the purchase, even if a price could be agreed on at which the "Missourians" would sell, and Bissell and Foss would buy. Neither Bissell nor Foss, nor both of them together, had enough means at their command to pay as much as one thousand dollars.

No perceptible progress was made toward the acquisition of the interests held by the "Missourians," and so the matter remained for a week or more.

At the expiration of this time, Hunter went from Colorado Springs, (his home), to Leadville and there, about the 28th of September, met, and talked with Foss.

Foss explained to him that the "Missourians" were anxious to sell—that there was danger of their interests passing into the hands of Tabor and Reische—that none of the money, in Bank as an indemnity to Halleck, could be used in making the purchase, and that he himself did not have the necessary means.

Hunter was at that time cashier of the "People's Bank" at Colorado Springs, and it was suggested by Foss, that Hunter might be able to get the money there.

The telegraph was used, and arrangements made by Hunter to get the necessary amount to make the purchase.

The "Missourians" were seen and the purchase made of their interests in the property at the sum of fifteen thousand dollars. The arrangement between Foss and Hunter being that Foss should have one-third and Hunter two-thirds of the interests bought of the "Missourians."

This was on the 30th day of September, 1878, when the sale was made. Foss paid them cash at Leadville $300, and agreed that the balance should be paid them at Colorado Springs by Hunter.

On the next day, or the day following, Handley, Robertson and Rawlings, in company with Hunter, left Leadville for Colorado Springs. Arriving at the latter place Hunter paid them the remainder of the purchase money, to-wit: the sum of fourteen thousand seven hundred dollars (less the exchange) in drafts of the "Peoples' Bank," on the Banking house of Bartholow, Lewis & Co., St. Louis. Upon the delivery of these drafts to Handley, Robertson and Rawlings, they delivered their deed to Foss, into the hands of Hunter. This completed the transaction.

Bissel was advised of the sale and transfer of these interests by Handley before the latter left Leadville.

The injunction proceedings of Tabor and Reische before referred to, were still pending in the District Court at Leadville. Notice, however, had been given by the complainants that an application would be made to Judge Bowen, at Denver, for a temporary injunction in said cause, and the same had been served on the defendants, to-wit: Bissell, Foss, Hunter, Handley, Robertson and Rawlings. Without stopping to return the deed (made by the "Missourians" to Foss) to Leadville, to be recorded, Hunter, upon the telegraphic requests of Bissell, sent the deed to Denver to be used at the hearing before Judge Bowen.

This was about the middle of October. After this time, but before the 16th of November, Jerome B. Chaffee purchased the interest of Gustave Reische, in the Little Pittsburg, New Discovery, Dives and Winnemuck lodes.

A compromise was, on the 16th of November, 1878, effected between Tabor and Chaffee on the one hand, and Bissell, Hunter and Foss on the other, by which their several interests in all of these lodes were consolidated.

Tabor and Chaffee were to receive 73 per cent. and Bissell, Foss and Hunter 27 per cent. of the net proceeds derived from these several lodes.

These sums were to be deposited in the First National Bank of Denver, to the credit of the parties respectively; that is, 73 per cent. to the credit of Tabor and Chaffee, and 27 per cent. to the joint credit of Bissell, Foss and Hunter.

After this consolidation of interest had taken place, Bissell, who was aware of the fact that the deed of Handley and others to Foss *had not been recorded*, employed one Charles Cavender of Leadville, to go to Missouri, and if possible get another deed from the same parties, and for the same interests, made to one Reynolds, (a friend of Bissell's) residing at Colorado Springs. The effort was successful—the deed was procured by the payment of one hundred dollars to each of the three parties, towit: Handley, Robertson and Rawlins. Cavender returned to Colorado, and the deed was duly recorded on the second day of ~~November~~ Dec.

On the day that this deed was recorded, the *unrecorded* deed to Foss, was mailed by Bissell's attorney at Denver, directed to J. Y. Marshall Esq. at Leadville, and by *Charles Cavender* (for Marshall) received, on the fourth day of December, at Leadville.

Shortly after this, Bissell served notice on "The First National Bank of Denver," that he was the owner in his own right of four-twelfths, and as the agent and attorney of Reynolds of three twelfths, (in all seven twelfths) of the amount then standing to the joint credit of himself, Foss and Hunter, and of a like interest in all sums that might thereafter be placed to their credit under the contract of the 16th of November with Tabor and Chaffee.

The Bank refused to pay out any part of this money except on the joint check of Bissell, Foss and Hunter, and so it remained until the latter part of May, 1879, when Bissell abandoned the claim made by him "*as agent* and attorney" of Reynolds.

ARGUMENT.

The principal question arising in this case is, as to whether the purchase made by Foss and Hunter on the 30th of September, 1878, of the interests of Handley, Robertson and Rawlings, in the Winnemuck and New Discovery lodes, in any wise enured to the benefit of Bissell?

The appellant, in his answer, claims that these interests were bought and paid for with monies belonging to himself, and the appellees Foss and Hunter; and that therefore he is entitled in equity to an equal interest in the property purchased.

It is now insisted:

First. That there was a contract, between Bissell and Foss, that the interests of Handley, Robertson and Rawlings should be purchased for the equal benefit of themselves and Hunter, provided those interests could be obtained for $15,000.

Second. That, if there was in fact no contract, there *was, at least*, a mutual agreement between Bissell and Foss that if either made the purchase it should be for the benefit of all, and that, by reason of the relations that existed between the parties, a *constructive trust* was created which a Court of equity will enforce.

It is not deemed necessary to refer at length to all of the testimony touching the mode of payment to the "Missourians" (as Handley, Robertson and Rawlings were called), nor from what source the money came that made the payment, inasmuch as appellants counsel do not insist that any part of it belonged to Bissell.

It tends, however, to *disprove* the positions now assumed by appellant.

So much of the testimony of Hunter, as seems to bear upon this question, is here given. Record p. 63–6:

Interrogatory 15. What time, if at all, was the conveyance made to Foss by Handley, Robertson, and Rawlings?

A. I think it was September 30th, but I would not be positive; it was either September 30th, or October 1st; somewhere about the latter part of September or the first part of October.

Int. 16. What was the consideration agreed to be paid to Handley, Robertson, and Rawlings for the interest in the New Discovery, and their one-fourth interest in the 'Vinnemuck?

A. $15,000.

Int. 17. Will you state what arrangement was made between Foss and yourself in reference to the quarter interest Handley, Robertson, and Rawlings had in the Winnemuck, and their interest in the New Discovery mine?

A. The arrangement between Foss and myself was this: If I bought these gentlemen out, I was to put up the money until we could either make it out of the mine, or get it in some other way, if I should need the money; I was to get two-third's interest and he was to get one-third; I did so; I furnished the money.

By Mr. Rockwell:

One-third of his quarter?

A. The whole quarter; I furnished the money to pay for the whole quarter, and the whole thing.

Int. 18. By Mr. Dyer (resuming): And were to get of that one-quarter what?

A. Two-thirds.

Int. 19. And Foss was to get of that quarter one-third?

A. Yes, sir; in other words, I was to get two-twelfths, and he one-twelfth, and our *pro rata* of our part of the New Discovery.

Int. 20. What time did you leave Leadville for Colorado Springs, and in company with whom?

A. I don't know that I can tell; in company with all the parties but Mr. Robertson; Handley and Rawlings were on the coach with me; it was some time about the first of October, perhaps the first, or may be the second; I cannot say.

Int. 21. Did they go in company with you to Colorado Springs?

A. They did.

Int. 22. State whether it was was understood that the money was to be paid them at Colorado Springs?

A. It was, and was paid there.

Int. 23. I will get you to look at these three drafts, dated Colorado Springs, October 4th, 1878, and state whether or no they were given to the parties therein named in payment for their interest in the Winnemuck and New Discovery mines (handing drafts to the witness).

A. I will state the amounts of these separately. One draft is issued by the People's Bank, of Colorado Springs; is signed by me as cashier, payable to the order of Amos B. Rawlings; drawn on Barthalow, Lewis & Co., of St. Louis, $4,389; endorsed by Amos B. Rawlings, and Patterson Stewart, and I. M. Smith, cashier of the Bank of Kansas City. The next one is dated October 4th; issued by the People's Bank; signed by me as cashier, in favor of George W. Robertson, on Barthalow, Lewis & Co., of St. Louis, for $5,885.25; endorsed by George W. Robertson and the Morrison-Wentworth Bank, William Morrison, cashier. The endorsement does not show when it was paid by Barthalow, Lewis & Co. It passed through the clearing house, of St. Louis, on October 9th, 1878. Sometimes they stamp them in the clearing house, and sometimes they do not. This one went through the clearing house October 9th, 1878. The next one is dated October 4th. 1878; issued by the People's Bank; signed by me as cashier, in favor of Edward H. Handley; drawn on Barthalow, Lewis & Co., for $4,389. I would state that these several amounts do not make $15,000.

Int. 24. I will get at that after awhile. By whom is that draft endorsed?

A. It is endorsed by Edward H. Handley, and Morrison-Wentworth Bank, of Lexington, Missouri, William Morrison, cashier. That passed through the clearing house at St. Louis, on October 8th, 1878.

Int. 25. What is the total amount of those drafts?

A. I could not tell without footing them up. I can state this, though, in the first place, there was $300 paid in Leadville to Robertson, Handley and Rawlings, and these amounts were paid afterwards. I also paid him some currency; I don't remember how much it was; and that the exchange made $15,000. I paid him $14,700 in the Springs, and he was paid $300 in Leadville, and the exchange on the draft was $36.75, perhaps.

Int. 26. The cash and drafts together, less exchange, made $15,000.

A. Yes, sir; including the $300 paid in Leadville.

Int. 27. That is what I mean.

A. There is another thing here that perhaps I might speak of. There are two of these drafts made payable for $4,389 each; the remaining draft to Mr. George W. Robertson is for $5,885.25; the difference between these drafts was proportioned out among the gentlemen themselves; Robertson would not sell unless they would make up his proportion of the difference.

Int. 28. You drew the drafts as they, among themselves, agreed they should be drawn?

A. I did, just as they agreed on; I said before that I was not sure about paying any currency at the Springs; I did not pay any; these drafts amount to $14, 663.25; the exchange on that was $36.75, making $14,700, and $300 paid in Leadville makes $15, 000.

(The drafts testified to by witness were offered in evidence and marked as follows: Draft No. 5778, marked "Exhibit F;" draft No. 5779, marked "Exhibit G;" draft No. 5780, marked "Exhibit H.")

Int. 29. State, if you please, when, if at all, the sums represented by these drafts were returned to you, or you were reimbursed for the amount you expended on that account?

A. I was paid the money back some time about the first part of January, 1879.

Int. 30. Was any portion of this money upon which those drafts were drawn belonging to the Winnemuck mine at the time you drew them?

A. No, sir; not a cent of it.

Int. 31. Under the arrangement that was made by Foss and yourself at the time of the purchase of Handley, Robertson, and Rawlings' interest, you were to advance the money for that purchase, is that true?

A. Yes, sir; that is true.

Int. 32. And in consideration of the advancement thus made, you were to receive two-thirds, and Mr. Foss one-third of Handley, Robertson, and Rawlings' interest?

A. Yes, sir; that is, two-thirds of the fourth, which would be two-twelfths, and one-twelfth to Foss, and the proportionate part of the New Discovery.

Int. 33. At the time this trade was made for this quarter interest, and you agreed to advance the money to make the purchase, will you state whether you had any conversation with Bissell about purchasing any interest in this mine, or not?

A. I never did, sir.

Int. 34. You may state for whom this quarter interest from Handley, Robertson, and Rawlings was made?

A. It was purchased for Foss and myself.

Int. 35. To your knowledge, did Bissell have any part or parcel in the purchase of that interest?

A. Not that I ever heard of. He did not have anything to do with making the sale.

Int. 36. If it had been understood that you were not to receive two-thirds of that one-fourth, and that Bissell was to share in it, would you have advanced the money to make the payments?

A. No, sir, I don't think I would, that is, knowing how the thing was. Of course, afterwards, it would have been a different thing; the mine was in a very bad shape just at that time.

Int. 37. You may state whether you knew that certain attachment suits had been brought by Tabor and Reische against yourself, Foss, Bissell and Handley, Robertson and Rawlings, touching the ore that had been taken out of the Winnemuck mine at that time?

A. I did.

Int. 38. Did you know of any arrangement that was made with Halleck and others, who went on these bonds, that the money made out of the mines should remain in Bank as their security against loss by reason of their going on bonds?

A. Yes, sir; I did.

The testimony of Nelson Halleck shows very clearly the agreement made with Bissell, Foss and others, when he signed the bonds for them.

It was not in the power of Bissell and Foss, nor either of them, to use this money for the purchase of the interests of the "Missourians" without the consent of Halleck. (R. p. 115–116.)

Halleck testified as follows:

Int. 4. State whether or not, you are the Halleck who signed an attachment bond, or forthcoming bond, for Bissell, Foss, Hunter, Robertson, Rawlings or Handley, or some of them, for the purpose of releasing the ore which Tabor and Reische had attached under the claim that it was the ore belonging to the Pittsburg lode, as owned by them, as against the right of the first-named parties to the ore, as taken out of the Winnemuck?

A. Yes, sir; I am the Halleck.

Int. 5. State the time, as near as you can, when those bonds were signed?

A. It was the last of September, or first part of October. I can't tell the exact date. That was about the time.

Int. 6. State whether or not, you were in any way or manner secured or indemnified for the signing of the bond; if you answer yes, state in what way or manner?

A. I was secured by going to James & Eddy, and drawing a check for the amount or money I signed the bond for. The ore was attached, as you all know, and by giving bonds for the amount of money that the ore was assumed to be worth, about a hundred tons of ore was attached, and it was valued at so much money. I went down with Foss, Trimble, and that concern, and I signed a forthcoming bond for that amount of money, and it was satisfactory to the parties receiving the bond. I got a check from James & Eddy for the amount I went security for.

Int. 7. Name the amount you went security for.

A. It was about twelve thousand dollars; it might have been a few dollars over that sum, but that was about the amount. We estimated at that time that the ore was worth about twelve thousand dollars.

Int. 8. State whose check it was.

A. It was James & Eddy's check.

Int. 9. Given for what ore?

A. Given for the ore taken from the Winnemuck mine by Foss, Bissell, Hunter, and the Missouri boys.

Int. 10. How long did you hold that check?

A. I can't tell exactly. It laid in my safe for some time. I had it until the trouble was settled in some way.

Int. 11. What did you finally do with the check?

A. I think the check was turned over to Foss, Trimble, and the Missouri boys—that company. I think that the check was turned over to them while I was in Denver. I was here, and my clerk was instructed to turn the check over.

Int. 12. State what your information was as to whether, or not, the trouble and matters in dispute between Tabor, Reische, aud Hook, on the one side, and Foss, Bissell, and Hunter, on the other side, was, or was not, settled at the time you surrendered this check.

A. I think it was.

Int. 13. State the tenure and conditions upon which you held this check.

A. If the suit went against Foss, Bissell and Company, why I had the money there to release myself in the matter. I could pay it right over. I was holden for that amount of money which the ore was valued at. I signed a bond, and was responsible; and I held this check as security for the bond which I signed.

The deed of the 30th of September, 1878, to Foss, was delivered to Hunter at Colorado Springs, on the 3d or 4th of October by the "Missourians" after they had received payment for their interests.

The deed was sent by Hunter at Bissell's instance to Denver before the same was recorded.

It remained in the pssession of Bissell's attorneys until the 4th day of December, following.

Bissell knew where this deed was and knew that it had not been recorded. The compromise with Tabor and Chaffee was effected on the 16th of November, and the interests of all parties in the Winnemuck, Pittsburg, New Discovery, and Dives lodes were consolidated.

As soon as this was done Bissell went to work to get a deed from the "Missourians" to the same interests they had previously conveyed to Foss. For this purpose he employed Charles Cavender to make a pilgrimage to Missouri, and instructed him to get the deed as soon as possible and put it of record, before the deed to Foss was recorded. This attempt at fraud was successful, so far as getting the deed from the "Missourians" was concerned and of getting it on record before the deed to Foss had been recorded. It appears that on the very day, to-wit: the 2nd of December 1878, that this fraudulent deed was placed on record, the unrecorded deed, to Foss, was mailed at Denver and directed to Leadville, where it arrived on December 4th, and was there received by the same Charles Cavender, who, after its receipt delivered the same to the rightful owner.

The evidence of Bissell on this point (Record p. 81–3) is as follows:

X-Int. 17. State what conversation you had with Mr. Cavender touching the preparation of this deed, or having it made—this deed from Handley, Robertson, and Rawlings to Reynolds. What directions did you give?

A. I told Mr. Cavender that I wanted him to draw a deed of that character, and go to Missouri and get it executed; that is, he was to go first to Colorado Springs, where he would find Dr. Reynolds, and where he would probably get a letter from Dr. Reynolds to these gentlemen, asking them to make a deed, to him, of their interest in the Winnemuck and New Discovery mines. As soon as he saw Dr. Reynolds, he was to go at once to the home of Handley, Robertson, and Rawlings, in Missouri, and get the deed from them.

X-Int 18. Up to that time had you had a conversation with Dr. Reynolds in reference to this matter?

A. I think that all I ever had to do with Reynolds regarding it was, that I had written him. I don't think I ever had any conversation with him.

X-Int. 19. When you told Cavender to come to Denver and Colorado Springs, that he would find a letter, state what letter you had reference to.

A. That Dr. Reynolds would give him a letter to take to Missouri.

X-Int. 20. Was the letter to be written by Dr. Reynolds?

A. Yes, sir; I never wrote any letter in the matter at all, notwithstanding the testimony yesterday. I mean by that, that I never wrote any letter to Handley, Robertson and Rawlings.

X-Int. 21. Had you written to Reynolds the form of a letter which he was to send to Robertson, Rawlings, and Handley?

A. No, sir; I had not.

X-Int. 22. In your correspondence with Reynolds, did you suggest to him that he should write a letter to Robertson, Handley, and Rawlings, and give it to Cavender?

A. I think I did, sir.

X-Int. 23. Did you, in your letter to Reynolds, tell him the purpose that you had in getting the deed?

A I stated to Reynolds that I was entitled honestly to a third interest in the one-fourth that those Missourians had sold to Foss, and that I was in pursuit of this deed to make sure of my rights in the case, which Mr. Foss did not seem willing to respect, or words to that effect. I don't know that these were the words but that is the substance of what I said to Dr. Reynolds.

X-Int. 24. Did you send any money to Dr. Reynolds to pay Handley, Robertson, and Rawlings for making this second deed?

A. Dr. Reynolds had charge of all my money matters there, and I allowed him to make use of it.

X-Int. 25. Did you direct him to make use of such an amount as in his judgment was necessary to accomplish the purpose that you had in view?

A. I think I limited it. I don't know about that.

X-Int. 26. What limit did you put on the amount of money that he should pay to get this deed?

A. The amount used was $600.00. I don't know, but I rather think he was limited to that. The amount that was paid for expenses, and so forth, for the payment to those parties was $600. I don't know whether that was the limit I fixed, or not.

X-Int. 27. Did you pay Cavender himself, or did Dr. Reynolds pay Cavender for you?

A. Well, our money matters were very much mixed up. Reynolds had my Bank account there, and I gave authority by word of mouth at the Bank to honor his checks on my account, so that I really could not tell whether I gave the check, or whether Reynolds gave the check. Dr. Reynolds had just as free access to my Bank account with the privilege of drawing checks on it, as I had myself.

X-Int. 28. Do you know, in point of fact, how much was paid to Cavender of your money for going to Missouri and getting the deed from Handley, Robertson and Rawlings?

A. I think Mr. Cavender never received anything but his expense money.

X-Int. 29. Do you know whether Handley, Robertson, and Rawlings received any more than $300 for making this deed, or not?

A. I do not, sir. I know only their own statement; and, I think, Mr. Cavender stated the same thing, that they got $300—a hundred dollars apiece.

X-Int. 30. If, then, $600 was paid, $300 went to Handley, Robertson and Rawlings, and the other $300 went to Cavender for his expenses in going to Missouri; is that true?

A. Mr. Cavender on his return refunded me some money. I cannot tell you how much, but I should think in the neighborhood of $75 or $80.

X-Int. 31. So, then, the total expenditure made for this deed by you was how much?

A. I think about somewhere in the neighborhood of $525.

X-Int. 32. Of that amount state what portion C. J. Reynolds paid, if any, of his own money.

A. There was only one payment made, as I have said before, and whether that was made by check from me, or check from Reynolds, I am not positive.

X-Int. 33. Will you state the reason you had for having

Reynolds make the payment and write the letter, rather making the payment by your own check, and writing the letter yourself?

A. It was simply because I knew that my own negotiations would not be valid; that I was a party knowing to the fact of a deed having passed to Mr. Foss.

The evidence of Handley on this point is as follows: (R. p. 47-9.)

Int. 45. Are you acquainted with Charles Cavender?
A. Yes, sir.

Int. 46. When did you first become acquainted with him?
A. In August, 1878.

Int. 47. Was he one of the attorneys in your law suits with Tabor and Reische for you?
A. Yes, sir.

Int. 48. You knew him then at Leadville, while this litigation was going on between Reische and Tabor, and yourselves?
A. Yes, sir.

Int. 49. He was one of your attorneys, and also for Dr. Bissell?
A. He was attorney for the company.

Int. 50. After seeing him at Leadville, when did you next see him after your return home, if at all?
A. On November 25th, 1878.

Int. 51. Where did you see him?
A. At my home.

Int. 52. At what time did he come to your home?
A. About one o'clock in the afternoon.

Int. 53. Did he deliver you a letter from Dr. Charles R. Bissell?

A. He took a letter out of his pocket, and started to hand it to me; then he said he would read it to me instead, and stood up in the buggy and read it to me.

Int. 54. What became of that letter, if you know?

A. I don't know; Cavender kept it.

Int. 55. Did he let you take it?

A. No, sir; he just read it to me.

Int. 56. State the substance of that letter, inasmuch as it is not in your power to produce it.

Objected to as immaterial. The letter itself is the better evidence. It is not shown that the letter is lost, or that Dr. Bissell ever signed it, or sent it.

A. As he read it to me it was to have Robertson, Rawlings and myself convey the one-fourth interest in the Winnemuck which we had sold to Mr. Foss, but I think the letter stated that it would in no way involve us or make us liable for what we were doing. That was the substance of the letter. They offered us $100 a piece, if we would make the deed.

Int. 57. What did you do then?

A. We went over to Warrensburg, Missouri, that day and signed the deed, about 7 o'clock, and Cavender took the 8 o'clock train for Leadville again.

Int. 58. That was on the 25th, of November 1878

A. Yes.

Int. 59 How much did Cavender pay you, Robertson, and Rawlings for signing the deed that you speak of to the interest to which you had before that time sold to Foss?

A. He paid us $300.

Int. 60. How much a piece?

A. He gave us $100. apiece.

Int. 61. Was there anything further said in that letter which purported to be from Dr. Bissell, telling you that he wanted the deed to compel Mr. Foss to convey an interest to him?

A. I think there was; yes, sir; it did.

After this fraud had been perpetrated and accomplished by Bissell, he undertook to avail himself of it by serving the following notice on the First National Bank of Denver. (Record p. 4.)

"Denver Col., January 8th, 1879.

"To the First National Bank of Denver.

"I hereby forbid the payment of any part or portion of "the money deposited with you to the joint credit of Absalom V. Hunter, Simon H. Foss and myself as our proportion of the dividend derived from the Little Pittsburg "Consolidated Mining Company. There is a contract signed "by each of us, that this money can not be drawn without the jotnt signatures of all of us to the order. I claim "seven-twelfths (7-12) of it. They deny my right to "but three-twelfths. Until this dispute is adjusted I can not "consent to the withdrawing of it. This 7-12, but 4-12 is "is my own and the other 3-12 as agent and att'y for C. J. "Reynolds.

"Very truly
"C. R. Bissell."

The bank refused to pay to appellees Foss and Hunter any portion of the money, and so it remained until this suit was instituted.

The conduct of the appellant, as shown in the record in this case, may, and should, have much to do in determining the question as to how much reliance is to be placed upon his testimony.

The evidence of Foss, as to what occurred at the conversation between himself and Bissell, is fully sustained by the evidence of Handley. Bissell in his answer claims (Record p. 17) that it was through his efforts with Handley, Rawlings and Robertson that the price of their interest was reduced to $15,000.

Handley says that Bissell never spoke to him about it at all.

So much of the testimony of Foss and of Handley as seems to bear on this question is as follows:

Foss estifies (Record p. 34-5) as follows:

Int. 14. In the last of September, 1878, can you state how, if at all, the interests of these several parties who were owners in the mine were changed?

A. Well, in the first place, these Missourians, (as we always called them) Handley, Robertson, and Rawlings, wanted to dispose of their interest. They wanted to draw out some money, and I told them that as long as Tabor and the Little Pittsburg Company were suing us and attaching our ore, etc., it was impossible to let them have any money, as we had given our word to Halleck and the others who went on our attachment bonds, that we would retain all the money, or deposit it in Bank. In the meantime, Mr. Handley kept wanting to sell, and I went to Dr. Bissell and talked it over with him about buying them out. We talked about $20,000; they had asked $30,000; the Doctor and I talked it over about twenty thousand dollars, and he said we can do better than that. So it ran along for a week, perhaps, or more; perhaps two weeks. I spoke to Handley, and asked him if anything had been done; if anything had been said to him; he said, no. I was over to the Theatre Comique one evening, and said, we want to do something right away about buying that interest. I understood that a man by the name of Dexter had been in the mine for the purpose of looking at it and buying an interest for Tabor, and so getting possession. While I was sitting there, Hunter came in and overheard some of the conversation, and I concluded that we had got to buy it at any price. I told Hunter to go ahead. Hunter went ahead with it, and we bought it, or I bought it.

Int. 15. Before going further into that, will you explain what litigation had taken place between the owners of the Little Pittsburg and yourselves before that time?

A. They had been attaching our ore.

Int. 16. Give an explanation of those law suits.

A. All the ore we hauled from the mine was attached by Tabor and Reische, and we had to give a forthcoming bond to get the ore; we gave good security every time, and secured them by leaving the money in Bank; that was the reason why we could not declare a dividend.

Int. 17. Do you recollect how many attachment bonds were given by you under these attachments?

A. Perhaps three; it might have been two, or perhaps four.

Int. 18. Do you know the amount of each bond?

A. I don't remember. One must have been $30,000.00; one, perhaps, was forty thousand. I don't remember positively.

Int. 19. You can state whether or not the amount of the bonds was greater than the amount of the money?

A. It was greater. I don't know but in one case it was about equal to what we had there, but as a general thing it was much greater.

Int. 20. Will you state at what time you bought the fourth interest of Handley, Robertson, and Rawlings in the Winnemuck?

A. It was the last day of September, A. D., 1878.

Int. 21. What was the price paid?

A. $15,000.00.

Handley testified as follows. (R. p. 46–7):

Int. 23. State with whom you concluded and made the trade of your fourth interest in the mine; who did you trade and talk with?

A. I traded with Mr. Foss.

Int. 24. State whether at the time you traded with Foss, Dr. Bissell was present, and had anything to do with the trade?

A. No; he did not.

Int, 25. State what conversation, if any, you ever had with Dr. Bissell touching your connection with that mine?

A. I had no conversation with him privately; I tried to sell to Bissell and Foss when they were together. I told them I wanted to sell out; they asked why; and I told them it was because I didn't know anything about the business, or what was going on. Bissell said I was posted just as well as he was.

Int. 26. Was that all the conversation you ever had with Dr. Bissell touching the sale of that mine by you, before you made the trade?

A. Yes, sir.

Int. 27. Did he ever have any conversation with you in which he asked you to reduce your price from $30,000.00 to $15,000.00?

A. No, sir.

Int. 28. Was there ever any conversation had between Bissell and yourself, except what you have stated?

A. No, sir.

Int. 29. At the time you sold your interest to Foss, did you go and examine the state of the account of the Winnemuck company in the Exchange Bank?

A. Yes; I went to the Bank with Foss.

Int. 30. What was there to the credit of the Winnemuck Company altogether?

A. A little over $16,000.00, I think.

Int. 31. How much of that would have belonged to you?

A. One-fourth.

Int. 32. State whether or not in your sale to Mr. Foss of your interest in the Winnemuck mine, that amount was included in the sale?

A. Yes, sir.

Int. 33. Was it explained to you at the time?

A. Yes.

Int. 34. In the conversation had with you did you know that the suits had been brought by Tabor and Reische?

A. Yes, sir.

Int. 35. Did you know that attachment writs had been issued?

A. Yes, sir.

Int. 36. Did you know of the arrangement made with Halleck that the money should all remain in Bank until they were settled?

A. Yes, sir.

Int. 37. In your dealings with Foss, were you authorized to act for your partners, Robertson and Rawlings?

A. Yes; they were going to deed with me.

Int. 38. Had you the full control and management of the whole interest?

A. Yes sir.

Int. 39. And your trade with Foss was ratified by a deed from them, was it?

A. Yes, sir.

Int. 40. And you all went back to Missouri together?

A. Yes.

Int. 41. In your sale of the quarter interest to Foss, had Bissell, to your knowledge, anything whatever to do with it?

A. No, sir.

It is clearly shown that neither Foss nor Bissell, nor both of them together, had the money with which to make the purchase, even if they had agreed upon the price. It would have been an agreement impossible of execution. Upon this point Foss testified as follows: (Record, p. 37-8.)

Int. 43. State whether there was, up to the time you concluded the trade with Handley, any agreement with Dr. Bissel that you and he should buy that property for $15,000.

A. No, sir.

Int. 44. State what your financial condition was at that time, Mr. Foss.

A. All the resources I had was a small grocery store, not paying very largely, and I was just living in the hope of beating Tabor.

Int. 45. State whether you had money of your own at that time.

A. The money that I drew from the Bank, $300, to pay Handley and others, brought my account down very low.

Int. 46. I'll get you to state whether, at the time the agreement was made to purchase for $15,000, you had that amount of money on hand?

A. No, sir.

Your Honors *may be a little* "curious" to know how the foregoing testimony impressed Judge Hallett, who heard the case below. It is insisted by appellant that there was an agreement between Foss and himself to purchase the Handley interest. Judge Hallett says:

"There was, indeed, an agreement between Foss and "Bissell to purchase the Handley interest, IF *that may be* "*called an agreement which lacks the essential features of a* "PRICE *for the property* and MONEY to pay for it."

The evidence in this case was heard by Judge Hallett, whose finding upon a matter of fact, is entitled to, and will doubtless receive, from your Honors, great weight.

His particular familiarity with the law that must determine this case will also be readily acknowledged by your Honors. His opinion in this case seems to be so clear and contains such a full and complete answer to the points made by the learned counsel for appellant, that it were hardly necessary to burden your Honors with citation of authorities other than the authority *of that opinion itself*.

After making a full and comprehensive statement of the case as it appeared to him from the evidence, he proceeds as follows: (See 4 Fed. Rep., pp. 694-701.)

"The matter in controversy is whether, upon what took place in the "purchase of the Handley interest in the mines, Bissell is in equity to "be regarded as a party thereto. Out of the relations of the parties as "mining partners and tenants in common, or joint tenants of the three-"fourths interest in the property, as well as from the conference and "agreement between Foss and Bissell in respect to the purchase of the "Handley interest, it is contended that a duty arose on the part of Foss "towards his associates, which was violated by him in making the pur-"chase for Hunter and himself only. In other words, the position is as-"sumed that relations of trust and confidence existed between the par-"ties, by which the acts of each, relating to the common property, "should be controlled, and whatever was done by any of the owners "should be taken to be for the advantage of all; or that Bissell was too "confiding, and was overreached by Foss, who, while claiming to act "for all, sought to appropriate the purchase to Hunter and himself. "Familiar principles are invoked in support of this position, and we "shall best ascertain how far they may be applicable to the case, by "considering them with reference to the attitude of the parties in the "several positions in which we may find them in the record. And first "let us put out of view their associations as mining partners and tenants "in common, and consider whether, by the conference and agreement "to purchase the property between Foss and Bissell, anything was established upon which the claim of the latter may rest. If two or more "persons agree amongst themselves to purchase property for their joint "account, and the purchase is accordingly made by one or more of "them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, cannot be "cóntroverted. So, also, if two or more persons enter into a contract "with another to purchase property, all matters being fully arranged in "the agreement, the equal right of all vendees to proceed in the execution of the contract, may be conceded. To illustrate that proposition, "if the Handley party had agreed with Bissell, Foss and Hunter to sell "to them their interest in the mines, no one of the vendees could have "taken the title to himself under that contract until default by the party "excluded in some matter to which he was bound by the terms of the "agreement. Again, if one take unto himself a title which he has purchased with the money of another, he shall be a trustee for the true "owner, who may rightfully follow his fund, however it may be miscarried. But the record presents no one or more of these facts. There "was, indeed, an agreement between Foss and Bissell to purchase the "Handley interest, if that may be called an agreement, which lacks the "essential features of a price for the property and money to pay for it. "But Handley, Robertson, and Rawlings were not parties to that agreement, and therefore it was not in itself an agreement to purchase, but "to negotiate with them for the property. In that form it presents no "féature which can effect the title to the property. At most, it was an "agreement between intending purchasers, which could give no right to "either until it should be consummated in the purchase of the property. "If we regard Foss and Bissell as agreeing to an agency in respect to "the purchase of the property, the case is not different; for if one, who "is clearly an agent of another to purchase property, repudiate the "agency and act for himself, using his own funds, he cannot be declared "a trustee for his principal. *Burden v. Sheridan*, 36 Iowa, 125. A different rule appears to be laid down in Story's Eq. Jur. § 1211a, but its "limitation will be found in another section of the same volume—section 1201a.

An attempt was made, in argument at the bar, to put this case upon "the footing of a numerous class in the books in which real property was "granted upon a parol pledge from the grantee, to make some disposition of it; as where a son has been granted an estate upon condition "that he will support his father during his life-time, or where a devisee "has promised the testator to divide the estate with another. In all such "cases the trust may be established by parol, and the trust itself stands on "the plainest principles of justice. But to point out the distinction between those cases, and the case under consideration, can hardly be "necessary. Foss received nothing from Bissell on account of the purchase of the property, nor did he take the property with the understanding that he should admit Bissell to an interest to it. If he had "received the property upon a pledge to hold it for Bissell, or to make "some other disposition of it, his failure to do so would be a fraud upon "the grantors as well as the beneficiary, of which either might complain, and the principle invoked would be applicable. But here there "was nothing of that kind. The property was sold to Foss, who in fact "received it, and Bissell comes to complain that he was not admitted to "the purchase, as by his agreement with Foss, he should have been. "However, he may have been misled by the conduct of Foss, he was "not in fact a purchaser, and Foss did not receive the property to his "use in any way, and therefore he acquired no interest in it.

"If, now, we turn to the co-tenancy of the parties, we find in that relation nothing of weight respecting the question under consideration; "for although tenants in common are not at liberty to assail the common "title by which they all hold, they may deal with each other touching "their respective interests. (Freeman's Co-tenancy, 165.) While Bissell, Foss, and Hunter, and the Handley party, were all bound to maintain the common title, each was at liberty to purchase from the other in "the same manner as a stranger might purchase from any, or all of them. "(*Alexander v. Kennedy*, 3 Grant's Cases, 380.) It has never been "claimed that a purchase by one co-tenant of the interest of another "would enure to the benefit of all who should retain their interest, and "certainly there is nothing in the relations of such owners to support "that doctrine."

"The limitations to individual action on the part of the members of a "partnership in respect to those matters which may, or may not be within "the scope of the partnership business are in many cases not easily defined. "We know, however, that fidelity to the partnership is the highest duty of "its members, and that no member can be allowed to turn the partnership "concerns to his own account; and, whenever a member is found to be "seeking a private advantage from partnership dealings, the courts are "prompt to correct such an abuse of the confidence reposed in him by his "associates. A familiar application of the principle is found in the cases "cited by counsel, in which it is held that a partner cannot in his own name "renew the lease of the premises used by the firm. In New York the doctrine was applied to a case in which the renewal did not begin until the "co-partnership expired by its own limitation, and the reasons assigned by "the court are entirely satisfactory. *Mitchell v. Reed*, 61 N. Y. 123. The "position assumed in these cases is that the renewal is ancillary to the "original lease, and so far connected with it that it shall be regarded as a "part of it; and, as the original lease was owned by the firm, any attempt

"by a member to appropriate the renewal to his own use is a direct con-
"version of the property of the firm. In other words, the doctrine is
"that a member of a firm shall not be permitted to take unto himself the
"property of the firm, and the renewal of the lease wherof the firm holds
"the original is such property. and therefore it is protected for the use of
"the firm. To invoke the principle however, it is obviously necessary to
"show that the malversation was of the partnership funds or effects, for if
"it be otherwise, no member of the partnership can complain.

"And this brings us to inquire, what right or interest of the co-part-
"nership of which he was a member was used or asserted by Foss in
"making the purchase of his associates' interest in the mines? Is it true that
"in a mining partnership the firm has a right of pre-emption as to the in-
"terests of retiring partners in the mines? The answer is not doubtful.
"Where the partnership is formed expressly to work mines, and the
"mines are held by lease, the lease and renewal of it is, as the courts
"have held, partnership property. But, in the case at bar, the partner-
"ship arose out of a community of ownership in the mines, and the
"parties were, in a very large sense, involuntary associates. They came
"together upon the ground that they were tenants in common of the
"mines, and not upon any agreement to engage in the business of min-
"ing. Indeed, they had no agreement whatever respecting their joint
"operations; but they stood solely on their ownership of the property,
"in consideration of which they united for the purpose of working it.
"They were partners in the working, but not in the ownership, of the
"mines, and their firm was a thing of the hour, without hope of exist-
"ence. In that kind of association it cannot be said that there is in the
"collective body a right to acquire new interests which its members are
"bound to respect. The object of the partnership was to take out ore,
"and in all things directed to that end, each member owed allegiance to
"the company. Beyond that, they were entirely free to act touching
"their interest in the mines, as well as other individual property. Each
"member held his interest in the mines in his own right, with power to
"dispose of it as he should think proper, and each was free to deal with
"his associate or with a stranger in respect to such interest. So, also,
"each member was at liberty to buy from his associates, and thus enlarge
"his interest in the whole property without reference to the partnership
"relation. On the whole case no reason can be found for saying that the
"purchase of the Handley interest enured to the benefit of Bissell, or
"that he had any share in it. If, in making it, Foss violated his promise
"to Bissell, in that there was moral wrong, and possibly there may be
"some remedy for the breach. But it cannot be said that by such promise
"only Bissell, who furnished no part of the purchase money, acquired
"an interest in the mines.

"The money will be awarded to Foss and Hunter."

This opinion is supported by abundant authority. See:

Holmes v. Holmes, 44 Ill., p. 168.
Pennington v. Campbell, 60 Ill., p. 516.
Goodwin v. Richardson, 11 Mass., 469.
Wheatley v. Calhoun, 12 Leigh (Va.) 264.
Livermore v. Aldrich, 5 Cushing, 41.
Olcott v. Byrum, 17 Wall., 51.
4 Kent. Com., 337.

In conclusion, it is respectfully submitted, that after the proper application, (so eloquently urged by appellant's counsel) "of the enlightened and salutary doctrines of "equity on the subject of fraud and constructive trust— "doctrines which are necessary to bind the moral elements "of society together," to the appellant and the methods by which he sought to obtain the interest of the "Missourians" in the Winnemuck and New Discovery lodes, there will be but little else to engage the attention of the Court in this case.

DAVID P. DYER,
For Appellees.